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No. 355

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

NATIONAL MOTOR FREIGHT TRAFFIC ASSOCIATION, INC., COMMON CARRIER CONFERENCE-IRREGULAR ROUTE, AND REGULAR COMMON CARRIER CONFERENCE,

Appellants,

vs.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, PACIFIC PROGRESS SHIPPERS ASSOCIATION, INC. AND AMERICAN INSTITUTE FOR SHIPPERS' ASSOCIATIONS, INC.,

Appellees.

On Appeal from the United States District Court for the District of Columbia

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MOTION TO AFFIRM

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INDEX

	Page
OPINIONS BELOW	1
JURISDICTION	2
STATUTES INVOLVED	2
QUESTION PRESENTED	2
STATEMENT	2
THE QUESTIONS ARE UNSUBSTANTIAL AND DO NOT WARRANT FURTHER ARGUMENT	3
THE DISTRICT COURT AND THE COMMISSION PROPERLY CONCLUDED ON THE RECORD THAT PACIFIC PROGRESS SHIPPERS ASSOCIATION WAS EXCLUDED FROM REGULATION UNDER SECTION 402(c)(1) OF THE INTERSTATE COMMERCE ACT	6
THE DECISIONS OF THE COMMISSION AND DISTRICT COURT FULLY COMPLIED WITH SECTIONS 557 AND 706 OF THE ADMINISTRATIVE PROCEDURE ACT, RESPECTIVELY	11
CONCLUSION	14

TABLE OF AUTHORITIES

CASES:

Atlanta Shippers Association, Inc.—Investigation, 322 I.C.C. 273 (1964)	6-7, 8, 9
Baltimore Shippers and Receivers Association, Inc. v. *Public Utilities Commission of California*, 268 F. Supp. 836 (N.D. Cal. 1967), *aff'd.* 389 U.S. 583 (1968)	3, 6, 10
California Commercial Association v. *Wells, Fargo & Co.*, 14 I.C.C. 422 (1908)	6
Consolo v. *Federal Maritime Commission*, 383 U.S. 607 (1966)	14

Page

Freight Forwarders Institute v. *United States*, 263 F. Supp. 460 (S.D.N.Y. 1967) 8
Illinois Central Railroad Co. v. *Norfolk & Western Railway Co.*, 385 U.S. 57 (1966) 14
Interstate Commerce Commission v. *Chicago Food Mfrs. Pool Car Group*, 39 F. Supp. 283 (N.D. Ill. 1941) 6
Interstate Commerce Commission v. *Delaware, Lackawanna, & Western Railroad Co.*, 220 U.S. 235 (1911) 4, 5-6, 9
Lovell—Investigation of Operations, 92 M.C.C. 728 (1963) 7
Mueller Contract Carrier Application, 41 M.C.C. 295 (1942) 6
National Labor Relations Board v. *Walton Manufacturing Co.*, 369 U.S. 404 (1962) 5
National Motor Freight Traffic Association, Inc. v. *Baltimore Shippers and Receivers Cooperative*, 323 I.C.C. 775 (1964) 6
National Motor Freight Traffic Association, Inc. v. *New Hampshire Shippers Cooperative, Inc.*, 323 I.C.C. 658 (1964) 6
Texas Mexican Railway Co. v. *United States*, 250 F. Supp. 946 (S.D. Tex. 1966) 12
T.S.C. Motor Freight Lines v. *United States*, 186 F. Supp. 777 (S.D. Tex. 1960) 13
United States v. *Drum*, 368 U.S. 370 (1962) 7
United States v. *Pacific Coast Wholesalers' Ass'n.*, 338 U.S. 689 (1950) 4-5, 9
Universal Camera Corp. v. *National Labor Relations Board*, 340 U.S. 474 (1951) 14
Younger Brothers v. *United States*, 238 F. Supp. 859 (S.D. Tex 1965) 12

STATUTES:

Administrative Procedure Act,
5 U.S.C. § 557 ..... 11, 12, 13
5 U.S.C. § 706 ..... 11, 13, 14

Page

Interstate Commerce Act,

Part IV, 49 U.S.C. §§ 1001-1022 ..... 3, 9

Section 402(c)(1), 49 U.S.C. § 1002(c)(1) .. 3, 5, 6-7, 9

Judicial Code, 28 U.S.C. §§ 1253 and 2101(b) 2

MISCELLANEOUS:

Hearings on H. R. 3684 Before the Committee on Interstate and Foreign Commerce, 77th Cong., 1st Sess. (1941) 9

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MOTION TO AFFIRM

Appellee, American Institute for Shippers' Associations, Inc. (AISA), hereby moves to affirm the judgment of the District Court on the ground that the questions presented are so unsubstantial as not to warrant further argument.

OPINIONS BELOW

The decision of the United States District Court for the District of Columbia is unreported. Said decision and

the Court's subsequent judgment are printed in the "Appendix to Jurisdictional Statement" at pages 4-7 thereof. The order of the Interstate Commerce Commission and the decision of the Hearing Examiner are reported at 105 M.C.C. 199, and are printed at pages 8-102 of the "Appendix to Jurisdictional Statement."

JURISDICTION

Appellants seek to invoke the jurisdiction of this Court under 28 U.S.C. §§ 1253 and 2101(b).

STATUTES INVOLVED

Statutes involved are set forth at pages 1-3 of the "Appendix to Jurisdictional Statement." [1]

QUESTION PRESENTED

The questions presented by Appellants are inaccurate and misleading. Based upon the decisions below the question before this Court fairly may be stated as follows:

Whether the District Court properly found that the decision of the Interstate Commerce Commission was supported by substantial evidence.

STATEMENT

Appellee AISA is a national trade organization for shippers' associations, and as one of its stated purposes, acts as representative and spokesman for its members in judicial proceedings involving issues affecting shippers' associations. Through 49 members, AISA speaks for in excess of 1500 shippers, including manufacturers and retailers, who have joined shippers' associations in order to obtain freight transportation at the lowest possible cost by

[1] Hereinafter, AISA will refer to the "Appendix to Jurisdictional Statement" as "App. ——."

lawful means and methods. Generally, shippers' associations arrange for the interstate movement of their members' freight, on a nonprofit basis, and in so doing, secure economical transportation by taking advantage of carload, truckload, or volume rates. Utilizing the services of rail and motor carriers operating in interstate commerce, each association arranges for the assembly and consolidation of property, movement of such property, and breakbulk and distribution of the consolidated shipments. Shippers' associations operating in such manner are excluded from regulation under Part IV of the Interstate Commerce Act,[2] by the provisions of 49 U.S.C. § 1002(c)(1). In a decision affirmed by this Court, *Baltimore Shippers and Receivers Association, Inc.*, v. *Public Utilities Commission of California*, 268 F. Supp. 836 (N.D. Cal. 1967), *aff'd.* 389 U.S. 583 (1968), the District Court declared:

> The language of 49 U.S.C. § 1002(c)(1) indicates that nonprofit shippers' associations enjoy a preferred status within the scheme of national transportation. (268 F. Supp. at 844)

To bolster their patently weak position, Appellants have set forth a statement of the case which is factually inaccurate and self-serving. Appellee AISA hereby adopts the objective Statement of Appellees United States and Interstate Commerce Commission.

THE QUESTIONS ARE UNSUBSTANTIAL AND DO NOT WARRANT FURTHER ARGUMENT

Appellants raise three basic points in support of their position that the questions are substantial. "Reasons" cited by Appellants in urging this Court to consider the merits of the case have no basis in fact or law. Appellee AISA treats each of these reasons *seriatim*.

1. This appeal does not bring questions of first impression to this Court as Appellants claim. As early as 1911,

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[2] 49 U.S.C. §§ 1001-1022.

this Court recognized the place of shippers' associations in the national transportation system, the operations of these associations, and the distinction between these associations and freight forwarders. In *Interstate Commerce Commission* v. *Delaware, Lackawanna, & Western Railroad Co.*, 220 U.S. 235 (1911), this Court said:

> There can be no doubt that the privilege of shipping at a lesser rate for the carload shipment than was asked for a less-than-carload shipment came to be interwoven with and inseparable from the movement of commerce through the channels of railroad transportation. And the benefits of the lesser rate came to be obtained not alone by an owner of all the goods shipped in a carload, but by combinations of owners, by agreements between them concerning particular and isolated shipments, by the organization of associations of shippers having for their object the creating of agencies to receive merchandise belonging to the members of the association, and to aggregate and ship them in carload lots in the name of one consigner to a single consignee, at one destination, by the use of commission houses, storage and other companies, etc. (220 U.S. at 242-243)

This Court went on to distinguish the operations of the freight forwarder in stating:

> It is also undoubted that, in consequence of the facility of shipping at a lesser rate for a carload than for a less-than-carload shipment, there developed a class of persons known as forwarding agents, who embarked in the business of obtaining a carload rate for various owners of merchandise by aggregating their shipments, such agents relying for their compensation upon what they could make from the difference between the carload and less-than-carload rate. (220 U.S. at 243)

In *United States* v. *Pacific Coast Wholesalers' Ass'n.*, 338 U.S. 689 (1950), this Court had placed before it the operations of a shippers' association not unlike in struc-

ture to the Appellee association under attack here.[3] In determining under 49 U.S.C. § 1002(c)(1) that the Association in *Pacific Coast* was not in violation of the Interstate Commerce Act, this Court set the standard for determining the status of shippers' associations, stating: "On the contrary, it is clear that the nature of the relationship between the members and the group was thought to be determinative [by Congress]. Under that test, the valid claim to the statutory exemption is established by the original Commission decision." (338 U.S. at 691).

2. The Commission decision does not confuse or obliterate the distinction between shippers' associations and freight forwarders as Appellants claim. The Commission's decision is articulate in setting forth the applicable statutes, the applicable precedents, sufficient findings and sufficient conclusions. Thus, in essence, Appellants here are attempting to attack *factual* findings and conclusions drawn therefrom. This plainly is not a matter which raises a substantial issue in this Court. The issue, whether substantial evidence support the Commission's findings, has been decided by the District Court and no longer is judicially reviewable. *National Labor Relations Board* v. *Walton Manufacturing Co.*, 369 U.S. 404, 408 (1962).

3. Appellants attempt to substantiate the issues by claiming that shippers' associations are inimical to the common carrier and the national transportation system, and as such, should be curtailed. Such a claim has no relevance to the facts in this case,[4] nor is it factually or legally correct. *Rather than siphoning off freight from common carriers, shippers' associations have created and provided freight for both railroads and motor carriers.* This is evident from the nature of association operations. See, *e.g. Interstate Commerce Commission* v. *Delaware,*

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[3] The association in *Pacific Coast* was a corporation.

[4] Various "studies" cited by Appellants (J.S. 12-15) have no materiality here. These studies are not of record and their accuracy never has been tested.

Lackawanna, & Western Railroad Co., 220 U.S. 235 (1911); *Interstate Commerce Commission* v. *Chicago Food Mfrs. Pool Car Group*, 39 F. Supp. 283 (N.D. Ill. 1941); *National Motor Freight Traffic Association, Inc.* v. *New Hampshire Shippers Cooperative, Inc.*, 323 I.C.C. 658 (1964); *National Motor Freight Traffic Association, Inc.* v. *Baltimore Shippers and Receivers Cooperative*, 323 I.C.C. 775 (1964); *Mueller Contract Carrier Application*, 41 M.C.C. 295 (1942). As early as 1908 the Interstate Commerce Commission recognized that shippers' associations have "developed an immense volume of traffic which otherwise could never have been brought into being." *California Commercial Association* v. *Wells, Fargo & Co.*, 14 I.C.C. 422, 433-434 (1908).

Recently, in *Baltimore Shippers and Receivers Association, Inc.* v. *Public Utilities Commission of California*, 268 F. Supp. 836 (N.D. Calif. 1967), *aff'd.*, 389 U.S. 583 (1968), the controversy centered around the authority of a State to subject to rate regulation interstate motor carriers serving shippers' associations within commercial zones. In resolving the issue in favor of shippers' associations similar to the association under attack here, the District Court reasoned that Section 402(c) of the Interstate Commerce Act "indicates that nonprofit shippers' associations enjoy a preferred status within the scheme of national transportation." (268 F. Supp at 844). The Court further emphasized: "It is clear that the statute recognizes a benefit and endorses that benefit by exemption and that part of the benefit is in the distribution process." (268 F. Supp. at 844).

THE DISTRICT COURT AND THE COMMISSION PROPERLY CONCLUDED ON THE RECORD THAT PACIFIC PROGRESS SHIPPERS ASSOCIATION WAS EXCLUDED FROM REGULATION UNDER SECTION 402(c)(1) OF THE INTERSTATE COMMERCE ACT

In *Atlanta Shippers Association, Inc.—Investigation*, 322 I.C.C. 273 (1964), the Commission held that to come within the exclusion of Section 402(c)(1), 49 U.S.C.

§ 1002(c)(1), a shippers' association through its members must not only control the association operations, but must, in addition, bear the essential risks of the operation under consideration. In citing *United States* v. *Drum*, 368 U.S. 370 (1962), Appellants disregard the "control" issue. In *Drum*, this Court recognized the materiality of the "essential risk" question in determining the legality of a private carrier operation. While application of the *Drum* case to shippers' associations is improper because of the totally different operations of private motor carriers there involved, and nonprofit shippers' associations here involved, we do not necessarily disagree with the application of the "test of substance." The point is to be made clear, however, that the Commission's test of control set forth in *Atlanta Shippers* is extremely important and is in accord with the Commission's interpretation of *Drum*. In the subsequent case of *Lovell—Investigation of Operations*, 92 M.C.C. 728 (1963), the Commission concluded:

> The Court in the *Drum* case did not conclude that the Commission must *abandon* consideration of control in favor of a 'characteristic burden of transportation test,' but only held that the Commission may and has *supplemented* its 'control' test with other factors, thus demonstrating that, in essence, the test is one of substance involving an evaluation of all relevant factors. (92 M.C.C. at 736, emphasis in original, footnote omitted)

Appellants completely abandon the control issue in their presentation of arguments to this Court, and, by so doing, concede that no one other than the shipper members of the involved association have any right or ability to control, direct, or dominate the association operations.

Appellants incorrectly claim that the association under attack has not met the standard that the shipper members must bear the essential risks and burdens, financial and otherwise, of conducting the operations. In explaining this standard, the Commission said in *Atlanta Shippers*:

> To the extent, however, that the prior report of division 1 may be said to have imposed upon the association members a joint and several liability, we think the statutory requirements have been exceeded. The presence or absence of such "partnership" liability on the part of association members does not seem to have been accorded any importance by Congress in the overall scheme of forwarder regulation and will be given none here. In this connection, the major financial risk entailed in the conduct of association operations under section 402(c), other than such risks as are readily insurable, is the risk of loss, or to put it another way, the risk that the savings resulting from the association's use of applicable carload, truckload, or other volume rates, will be eaten up or more than offset by the association's operating expenses. And so long as this essential transportation burden is, in fact, borne ultimately by the members (rather than by someone else) who exercise effective surveillance over the physical consolidation and distribution operations, it is clear that there has been compliance with the statutory scheme. Accordingly, we are constrained to reject expressly this aspect of the division's decisions herein (322 I.C.C. at 285).

This language of the Commission was specifically approved by the District Court in *Freight Forwarders Institute* v. *United States*, 263 F. Supp. 460 (S.D.N.Y. 1967). In commenting upon the same arguments raised here by Appellants that Court stated:

> We agree with the Commission that it is sufficient that these risks *not* be borne by any party *other than the shipper association itself*, whatever its limitations on individual member liability, as long as the members in good faith exercise responsible control over their association's operations. (263 F. Supp. at 465, emphasis supplied.)

In the instant case the record fully supports the Commission's finding that no one other than Pacific Progress

Shippers Association and its members assumed the essential transportation burden or the risk that the savings resulting from the association's use of volume rates would be eaten up or more than offset by the association's operating expenses.

Appellants make much of the fact that associations are organized in the corporate form. Historically, however, shippers' associations have operated in such manner. See *Interstate Commerce Commission* v. *Delaware, Lackawanna, & Western Railroad Co.*, 220 U.S. 235 (1911). Moreover, at the legislative hearings from which 49 U.S.C. § 1002(c)(1) emanated, associations which testified were incorporated. *Hearings on H.R. 3684 Before the Committee on Interstate and Foreign Commerce*, 77th Cong. 1st Sess. 382, 389, 497 (1941). Congress, therefore, was fully aware of incorporated associations, and acknowledged the acceptability of the corporate form by passage of 49 U.S.C. § 1002(c)(1). There is nothing in the Act, its legislative history, or judicial interpretation thereof which even remotely suggests that incorporation is an impediment to the functioning of a shippers' association, or incompatible with 49 U.S.C. § 1002(c)(1). As stated by the Commission in *Atlanta Shippers*:

> * * * Congress did not intend that shippers must avoid use of the corporate form in conducting operations which otherwise would be clearly those of a nonprofit group or association of shippers within the meaning of section 402(c) of the act. (322 I.C.C. at 287)

Finally, this Court found an association to be entitled to the exclusion under 49 U.S.C. § 1002(c)(1) notwithstanding the fact that it was incorporated. *United States* v. *Pacific Coast Wholesalers Ass'n.*, 338 U.S. 689 (1950).

Profit-minded freight forwarders are regulated by the Commission under Part IV of the Interstate Commerce Act. These freight forwarders and nonprofit shippers' associations perform nearly identical physical functions.

There is absolutely no reason for injuring the shippers' association to the benefit of the freight forwarders by a strained interpretation of statutory standards as Appellants urge. In *Baltimore Shippers and Receivers Association, Inc.* v. *Public Utilities Commission of California, supra*, the Court held:

> Freight forwarders and non-profit shippers' associations perform nearly identical functions, except for the fact that the freight forwarders hold themselves out to do business with the public, rather than providing services only for members of an association, and they operate at a profit rather than as a non-profit service to members. (268 F. Supp. at 840)

Further, the Court commented;

> The language of 49 U.S.C. § 1002(c)(1) indicates that non-profit shippers' associations enjoy a preferred status within the scheme of national transportation. The exemption is made applicable to ". . . the operations of a shipper, or a group or association of shippers, in consolidating or distributing freight for themselves or for the members thereof, on a non-profit basis, for the purpose of securing the benefits of carload, truckload, or other volume rates . . . ." It is clear that the statute recognizes a benefit and endorses that benefit by exemption and that part of the benefit is in the distribution process. (268 F. Supp. at 844)

If, as the Court stated, and this Court affirmed, shippers' associations enjoy a preferred status under the Interstate Commerce Act, it would be contrary to "the scheme of national transportation" if artificial restrictions were placed upon the operations of shippers' associations. It thus is submitted that the Court below properly affirmed the Interstate Commerce Commission's conclusion that Appellants' complaint against Pacific Progress Shippers Association, Inc. should be dismissed.

THE DECISIONS OF THE COMMISSION AND DISTRICT COURT FULLY COMPLIED WITH SECTIONS 557 AND 706 OF THE ADMINISTRATIVE PROCEDURE ACT, RESPECTIVELY

The Commission Examiner made detailed findings and conclusions with respect to all contested issues, thus meeting his responsibilities under Section 557 of the Administrative Procedure Act (5 U.S.C. § 557). For example, as to the "financial responsibility" issue, the principal question raised by Appellants (J.S. 3), the Examiner *found, inter alia*: "Members are responsible for the payment of prepaid shipments if the consignor fails to pay." (App. 30); "It cannot be concluded from the example cited that the assistance rendered by the Association to its claimant member is tantamount to the processing of a loss and damage claim in contravention of article XIII of the By-Laws * * * In both of these circumstances, the witness admits, on cross-examination, that the Association did not pay any of these claims and acted only as an intermediary." (App. 45-46); ". . . the members were assessed the lawful tariff rate for a period of 3 months in order to recoup some of these losses." (App. 46).

Based upon an exhaustive consideration of the evidence and applicable legal principles, the Examiner *concluded, inter alia*: "Applying these elements to the facts in this record, it has not been shown that Pacific's operations include all of the essential functions of freight forwarding, or that this Association assumes responsibility for the transportation of members' shipments from point of receipt to point of destination. The evidence shows that the Association does no more than provide a transportation service for its members on a nonprofit basis." (App. 82-83). The Examiner further concluded:

> In light of the foregoing discussion and an analysis of all the evidence in the record, the Examiner concludes that the traffic handled by the defendant Association is for the members thereof; that the Association has been operated in good faith for the purpose

> of effecting savings in freight charges for its members by securing the benefits of carload, truckload, or other volume rates, and that it is operated on a nonprofit basis as contemplated by the exempt provisions of section 402(c)(1) and (2), and that none of the defendants herein is engaging in services as freight forwarders within the meaning of section 402(a)(5) of the act. (App. 89-90)

The Court's statement in *Texas Mexican Railway Co.* v. *United States*, 250 F. Supp. 946, 950 (S.D.Tex. 1966), is fully applicable here:

> A careful review of the record made in these proceedings convinces us that the findings and conclusions of the Examiner are supported by substantial evidence. They are attacked here by Plaintiffs on various grounds, but we cannot say that they are arbitrary, unsupported or inadequate.

By a unanimous order of its Division 1, the Commission upheld the Examiner's decision. Finding that the exceptions and replies of Appellant raised no new or material matters of fact or law not adequately considered and properly disposed of by the Examiner, the Commission adopted as its own the Examiner's report. Appellants claim that the additional citation by the Commission of two of its cases rendered such disposition illegal under Section 557 of the APA. The obvious absurdity of such a contention has heretofore been exposed. In *Younger Brothers* v. *United States*, 238 F. Supp. 859, 861 (S.D. Tex. 1965), the Court stated:

> This leaves only the tag end contention that in its disposition of the case, the Commission failed to comply with the requirement of § 8(b), 5 U.S.C.A. § 1007(b) of the APA, that the order reflect the reasons and basis for the findings and conclusions. If this is a claim that Division 1, otherwise fully satisfied with Examiner's Report, has to go through the laborious process of issuing its own decision-report, it quickly fails.

And in *T.S.C. Motor Freight Lines, Inc.* v. *United States*, 186 F. Supp. 777, 787 (S.D.Tex. 1960), the Court held as to an argument similar to that advanced by Appellants:

> The Administrative Procedure Act does not require that detailed findings with supporting reasons previously made and adhered to by the Commission be reiterated after each attack. The statement by the Commission that the 'findings of the Commission [are] in accordance with the evidence and the applicable law' is obviously a statement that the Commission is standing behind the original detailed and articulate findings and conclusions. The law requires no more.

The Commission's reliance upon the Examiner's decision here thus was proper under settled judicial construction of Section 557 of the APA.

Appellants further contend, however, that the District Court failed "to perform its duty under Section 706 of the" APA, "by deciding the relevant questions of law before it on appeal of the Commission's order." (J.S. 37) Essentially, Appellants argue that the District Court erred by affirming the Commission "on the basis of 'direct consideration of the statute itself,' . . ." thereby substituting "its own rationale for that of the Commission." (J.S. 39).

While Appellants would have this Court believe that the District Court so limited its rationale, the fact is otherwise. Without equivocation, the District Court held:

> The findings clearly show these [statutory] terms to be descriptive of the organization and operation of the association here involved. The evidence in the record amply supports these findings. The Examiner and the Commission so concluded. We agree. (App. 5).

Such is tantamount to a holding that the decision of the Commission is supported by substantial evidence.

Illinois Central Railroad Co. v. *Norfolk & Western Railway Co.*, 385 U.S. 57, 66 (1966). That being the case, the District Court fully and properly discharged its review functions under Section 706 of the APA (5 U.S.C. § 706) and judicial inquiry is at an end. *Consolo* v. *Federal Maritime Commission*, 383 U.S. 607, 620 (1966), *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474 (1951).

CONCLUSION

The District Court correctly held that the order of the Commission was supported by substantial evidence. Accordingly, Appellants seek to do no more than reargue issues of fact before this Court. Such issues do not merit further argument. Therefore, the decision of the District Court should be affirmed.

Respectfully submitted,

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